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### Lee v. Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc. Appellant's Reply Brief Dckt. 45390

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IN THE SUPREME COURT OF THE STATE OF IDAHO

DALE LEE and KATHI LEE, husband and wife,

Plaintiffs-Appellants,

vs.

WILLOW CREEK RANCH ESTATES  
NO. 2 SUBDIVISION HOMEOWNERS'  
ASSOCIATION, INC., an Idaho  
corporation, and DOES I –X, inclusive,

Defendants-Respondents.

Supreme Court Dkt. No. 45390-2017

Appeal from Canyon County  
Case No. CV-16-3425

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REPLY BRIEF OF APPELLANT

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APEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

HONORABLE CHRISTOPHER S. NYE  
DISTRICT JUDGE

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## RESPONSIVE STATEMENT

Dale and Kathi Lee (referred to herein and in prior briefing as the “Appellants” or the “Lees”), appealed the district court’s August 31, 2017 Memorandum Decision and Order on Parties’ Motions for Summary Judgment and HOA’s Motion to Amend (“Memorandum Decision”) wherein the district court granted Willow Creek Ranch Estates No.2 Subdivision Homeowners’ Association, Inc.’s (“Willow Creek HOA” or “HOA”) Motion for Summary Judgment and denied the Lees’ Motion for Summary Judgment. *See* Memorandum Decision, p.9 (R., p.239).

On March 6, 2018, the Lees filed their opening brief (“Appellant Brief”) and argued the district court erred by concluding the doctrine of “partial performance,” also referred to by Idaho appellate courts as a specific form of equitable estoppel, was not applicable to the present circumstances. *See generally*, Appellant Brief, pp.12 and 16. The Lees asserted that all material terms of an easement agreement had been fully performed and that there was evidence in the record that could have been utilized to resolve any potential ambiguity regarding the location of the easement. *Id.* at 15. The Lees also argued that to the extent the doctrine of partial performance was not determined to be applicable, that the Idaho Supreme Court should extend the doctrine of equitable servitude to cover the Lees’ circumstance. *Id.* at 17-21.

As to both issues on appeal, the Lees argued that because of the district court’s error in applying the law, the district court never got to the point of actually considering the equities and, that if the district court would have considered those equities, per either equitable theory, it would have determined that the equities heavily favored the Lees--those equities being that there was uncontrovertibly an easement agreement, that the parties incontrovertibly performed the

agreement by constructing a road and providing the Lees the three access points to the road as promised, that the Lees used and are using the road and access points as testified to by the Lees and a former member of the HOA, and that the HOA had actual and constructive knowledge of both the agreement and of the Lees' use of the access points. *See* Appellant Brief, p.1.

Again, as set forth in the Lees' Appellant Brief, the district court never got to a point of applying these equities or facts because it concluded that the equitable theories were precluded under Idaho law. It is this legal determination that the Lees assert was erroneous.

In response to these basic arguments, Willow Creek HOA makes a number of counter arguments. First, with regard to the Lees' claim that the easement agreement was performed and that the doctrine of part performance and equitable estoppel prevents the HOA from now preventing the Lees from continuing to access their property via the road, Kemp Road, the HOA argues i) the Lees waived the issue because they did not appeal the district court's ruling that "the deed does not reserve or create an easement for the Lees' use of Kemp Road, [and therefore] the Lees do not have an easement over Kemp Road" and that this would trump any determination as to partial performance of an easement agreement; ii) that partial performance is really specific performance, an argument the HOA contends was not raised below and is barred by the statute of limitations; and iii) even if the Lees' argument regarding partial performance was not procedurally barred, the district court did not err because there is no written property description of Kemp Road and because the Lees cannot show either possession or sufficient improvement to Kemp Road. *See* Respondent's Brief, pp.25-38.

Second, with regard to the Lees' assertion that this Court should extend the doctrine of equitable servitude to cover the present situation, the HOA simply regurgitates its district court argument that "equity" cannot be the basis for granting an "affirmative" right to access property.

And, as explained below, the HOA attempts to explain why prior Idaho Supreme Court case law applying equitable principles and finding the existence of such an affirmative right is somehow not applicable. *See* Respondent's Brief, pp.9-15.

As explained below, the HOA's arguments lack merit. If this Court determines that partial performance, *i.e.* equitable estoppel, is applicable, the district court's "alternative" ruling does not preclude this Court from ruling that the Lees have an equitable interest regardless of the warranty deed. Furthermore, the HOA's arguments regarding specific performance and statutes of limitations arguments are not on point and miss an obvious legal distinction--that the Lees are asserting that the easement agreement has already been performed and that by arguing partial performance, *i.e.*, equitable estoppel, the Lees are simply asking that they continue to be allowed to do what they have already been doing (but with proper legal authority and documentation). Finally, the HOA argues that "the Lees have not established sufficient part performance"--the actual substantive argument on appeal. *See* Respondent's Brief, p.36.

The HOA focuses primarily on its claim that the lack of a property description is fatal to the application of part performance and that "[t]he Lees have not established that they have been in possession of Kemp Road..." or sufficiently improved Kemp Road to assert equitable estoppel. *See* Respondent's Brief, p.36. As explained at length below, there is no ambiguity regarding location--the road and access points exist and are established. Further, the evidence in the record affirmatively proves improvement by the Lees of the access points connecting Kemp Road to the Lees' property, including fencing, gates, and culverts. And, the HOA's argument that possession has to be "for development purpose" imposes a requirement that does not exist and should not exist in the context of an "equitable" doctrine that considers all factors and circumstances. Moreover, there is simply no requirement in Idaho that requires a certain "kind"

of possession to assert this “equitable” remedy. Finally, the HOA’s argument that Idaho should not extend the doctrine of equitable servitude to the circumstances present fails to appreciate that Idaho has already adopted a liberal interpretation of the equitable doctrine that implicitly rejects the very distinction that the HOA relies on to preclude equitable relief.

In short, the HOA’s arguments are not persuasive and should be rejected.

#### RESPONSIVE DISCUSSION

As set forth above and in prior briefing, the Lees assert the district court erred when it concluded on summary judgment motions that it could not apply the doctrine of partial performance simply because a term in the underlying written document was not clear--specifically, that the 1997 Agreement or any other written agreement did not include a property description of the property subject to the easement, Kemp Road and the access points. *See* Appellant Brief, p.13. The Lees argued that the terms of an easement agreement, including the location of the easement and the access points, were known because the parties actually constructed both the road and the access points and that the district court should have applied this parole evidence to address any claimed ambiguity regarding a lack of a written property description of those structures. *Id.*

In response to this simple argument, the HOA argues i) that the Lees waived the issue of the existence of an easement or use of Kemp Road because of an easement; ii) even if the issue is not waived, specific performance of a prior easement agreement is barred by the statute of limitations; and iii) even if the Lees could assert partial performance as basis for excusing the statute of limitations, the facts do not support sufficient part performance. *See* Respondent’s Brief, pp.25-27. These three arguments all lack merit for the reasons explained below.



I. The Lees Did Not Waive The Ability To Challenge The District Court's Conclusion That There Was No Enforceable Easement Agreement Between The Parties

The HOA claims the Lees waived any argument regarding “any right to use Kemp Road...” See Respondent’s Brief, p.25. The HOA asserts that because the Lees did not assert the district court erred in finding that that the warranty deed from the Kemp family to the HOA did not reserve an easement, that the Lees cannot now on appeal claim an easement exists. This argument, however, fails to appreciate the legal effect of a ruling by this Court that an easement exists because of an equitable theory. Significantly, the acts at issue that create equitable relief are acts that continued long after the warranty deed was executed and include acts that extend past the execution of the warranty deed. Stated differently, if this Court determines the doctrine of part performance (*i.e.*, equitable estoppel) or that an equitable servitude should be applied, the district court’s finding that the warranty deed exists has no legal significance and does not preclude this Court from ruling in the Lees’ favor.

The Idaho Supreme Court has stated that “what constitutes part performance must depend upon the particular facts of each case and the sufficiency of particular acts is a matter of law.” See *Boesiger v. Freer*, 85 Idaho 551, 556, 381 P.2d 803, 804 (1963). “The most important acts which constitute a sufficient part performance are actual possession, permanent and valuable improvements and these two combined.” *Roundy v. Waner*, 98 Idaho 625, 629, 570 P.2d 862, 866 (1977) (quoting *Barton v. Dunlap*, 8 Idaho 82, 92, 66 P. 832, 836 (1901)). The acts constituting part performance must be proven by clear and convincing evidence, *Boesiger*, 85 Idaho at 558, 381 P.2d at 805, and they must also be definitely referable to the alleged oral contract, *Boesiger*, 85 Idaho at 557, 381 P.2d at 805; *Roundy*, 98 Idaho at 629, 570 P.2d at 866. Here, as set forth in the record, possession and improvements are shown by clear and convincing

evidence (including admissions by a member of the HOA) and, significant to the issue at hand, are acts that occurred (and are still occurring) after the execution of the warranty deed.

Moreover, the warranty deed that transferred the common area, including Kemp Road, from the Kemp Family Trust to the HOA (that at the time was controlled by the Kemps and Alan Mills) in 2005 was transferred “subject to all existing easements and rights-of-way of record *or implied.*” See August 4, 2016 Affidavit of Mathew C. Parks in Support of Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment, Exhibit D (“Aug. 4, 2016 Parks Aff.”) (R., p.101) (Emphasis added).

Thus, it is incontrovertible that the warranty deed contemplated the fact that “implied” rights-of-way and/or easements may exist and would be enforceable even after the transfer. In short, nothing in the district court’s ruling regarding the warranty deed should be a basis for preventing this Court from finding in the Lees’ favor in the event it concludes that an equitable theory, either partial performance (equitable estoppel) or equitable servitude, should have been applied to the facts of this case.

## II. The Lees’ Partial Performance Arguments Are Not Barred By The Statute Of Limitations

The HOA makes an additional procedural argument. The HOA proffers that what the Lees are really requesting is specific performance and that because the “Lees took the position that they were not seeking specific performance [below] and argued that claim was not raised in their pleadings” that the request for specific performance is now barred. See Respondent’s Brief, p.38. This argument is logically flawed and fails to appreciate both the arguments asserted below and on appeal. The Lees’ position from the beginning of this case is that an easement agreement existed between the Kemp Family and the Lees and that the best evidence of this is that the parties actually performed the agreement--Kemp Road was constructed, the access points from Kemp Road to the Lee property were built, including improvements like culverts, gates, and

fencing. The Lees have also asserted that they have and are using Kemp Road and the access points--so much so that members of the HOA had knowledge of the Lees' use. *See Horn Aff.*, ¶7 (R., p.176) ("It was obvious to me and anyone living in the subdivision, that the Lees accessed their property from Kemp Road.").

To be clear, the Lees are not asking the HOA to do anything. Indeed, that is why the Lees are referring to "part performance" as referenced by the Idaho Court of Appeals as a type of "equitable estoppel." *See Frantz v. Parke*, 111 Idaho 1005, 729 P.2d 1068 (Ct. App. 1986) ("[t]he doctrine of partial performance is best understood as a specific form of the more general principle of equitable estoppel."). It does not make sense for the Lees to demand "specific" performance of acts already completed. Rather, the Lees are asserting the doctrine of part performance to estop the HOA from going back on an agreement that has already been performed and that is already in operation. Simply put, the Lees request a legal ruling that the Lees have a legal basis to continue using Kemp Road. The HOA fails to address this argument directly apparently because the HOA would have to concede the significance of the parties' acts--acts constituting near complete performance of an easement agreement. Other than executing a written document memorializing the agreement--an easement agreement was performed in every respect.

III. The Record Contains Sufficient Evidence To Establish Part Performance And To Estop The HOA From Precluding The Lees' Continued Use Of Kemp Road Via The Access Points

A. *The Lack Of A Written Property Description Of Kemp Road And The Access Points Is Not Controlling*

Notwithstanding the case law cited by the Lees, the HOA maintains the argument that because there is no written property description for Kemp Road and/or the access points that the district court was legally precluded from applying the doctrine of part performance. *See*

Respondent's Brief, p.29. The HOA asserts that *Simmons v. Simons*, 134 Idaho 82, 11 P.3d 20 (2000), an Idaho Supreme Court case that applied the doctrine of partial performance, even though there was an insufficient property description, cannot be applied to the present facts. How the HOA arrives at this conclusion is not clear. The HOA incorrectly claims that *Simmons* is somehow inapplicable because it claims that, in the Lees' case, the underlying easement agreement was unenforceable because of lack of consideration. See Respondent's Brief, p. 33. First, the claim that there is no evidence regarding consideration of the easement is without basis and ignores the actual holding of *Simmons*. Mr. Lee specifically testified that the Lees agreed to sell the Kemps the land needed for the development, but required as a condition of that sale, that they be given access to the road constructed by the Kemps on the Kemps' property. See Lee Decl., ¶4 (R., p.39) ("My wife and I were willing to sell them [the Kemps] the 1.8 acres needed, but as a condition of that sale, wanted to ensure that we would have access to the road [] that was to be constructed by the Kemps.") Second, there is no legal support for the proposition that you cannot apply parole evidence simply because of an unproven allegation that the agreement did not have specific consideration. Here, an easement agreement was performed, Kemp Road was constructed and the access points were constructed--location and description were simply not an issue given the facts of this case. Accordingly, the HOA's claim that *Simmons* is not controlling is wrong.

*B. The Improvements And Use By The Lees Support Application Of Part Performance*

The HOA also asserts that, even if the district court erred by not looking at evidence sufficient to establish the location of the easement (the fact that Kemp Road and the access points were actually constructed), the district court's determination should be upheld because "the record contains no evidence that the Lees made any valuable improvements to Kemp Road

or that they used Kemp Road for the purposes outlined in the 1997 Agreement....” See Respondent’s Brief, p.35. This argument is also flawed.

As cited to in prior briefing and above, “[t]he most important acts which constitute a sufficient part performance are actual possession, permanent and valuable improvements and these two combined.” *Roundy*, 98 Idaho at 629, 570 P.2d at 866 (quoting *Barton v. Dunlap*, 8 Idaho 82, 92, 66 P. 832, 836 (1901)). Here, the facts in the record are important and dispositive. As referenced above, Mr. Lee testified that the Kemps and the Lees agreed that “[a]ccess to Kemp Road, [would be] given as a condition to the sale of the 1.8 acre parcel.” See Lee Decl., ¶5 (R., p.39); see also June 14, 2015 Declaration of Alan Mills (“Mills Decl.”), Exhibit A. (R., p.37). The 1997 Agreement also expressly stated that the Lees would be given three access points to the road:

Seller [Lees] shall also be entitled to 3 driveway access from the gravel road [Kemp Road] to be constructed by Buyer [Kemps] adjoining Seller’s [Lees’] property. Such access shall be constructed at Seller’s [Lees’] cost and subject to Seller [Lees] obtaining any necessary governmental approvals.

*Id.* Accordingly, the Lees sold the Kemps the property, the Kemps developed what is now the subdivision Willow Creek Ranch Estates #2, see Lee Decl., ¶12 (R., p.40), and, also significantly, Kemp Road was constructed as agreed. Additionally, Mr. Lee testified that consistent with and in performance of the agreements and expectations of the parties, after Kemp Road was constructed, the parties put in three driveway access points effectively giving the Lees’ property access to Kemp Road. See Lee Decl., ¶13 (R., p.40). And, in addition, the parties worked to make other additional improvements. These improvements included twenty-four foot culverts, gravel extending from Kemp Road to the Lees’ property, as well as wood fencing and metal gates that corresponded to the three access points. See Lee Decl., ¶14 (R., p.40, 226-230), Ex. C (R., p.45); see also Horn Aff., ¶8 (R., p.178). And, significantly, the Lees accessed their

property as admitted by an HOA member. *See* Horn Aff., ¶7 (R., p.176) (“It was obvious to me and anyone living in the subdivision, that the Lees accessed their property from Kemp Road.”).

Accordingly, the idea that the Lees did not exercise possession and did not participate in substantial improvements to the subject matter of the easement is simply without basis. Instead of disputing this claim, the HOA responds by claiming that the record is not clear that the above-referenced improvements were actually made by the Lees (or at least not paid for by the Lees) and that Lees’ use was somehow not enough because it was not “developmental purposes.” *See* Respondent’s Brief, pp.36-37. The HOA is wrong on the facts and misstates the law.

To begin with, the idea that the Lees were not involved and did participate in these improvements is a misrepresentation that the HOA knows to be false. The record clearly indicates that the improvements were either on the Lees’ property, *i.e.*, the gates and fencing, or connected the Lees’ property to the actual road, *i.e.*, the culverts and gravel. The HOA is simply making an argument against evidence and against what it knows to be true. Moreover, who paid for or took the lead role in making the improvements--improvements that related directly to the Lees’ access and use of a constructed road is not dispositive. Improvements involving the Lees’ property were made and are equities that favor a finding of estoppel.

Stated again for emphasis, the HOA fails to appreciate that this is an equitable doctrine that considers all the circumstances. The Court has simply stated that when considering the circumstances and whether this equitable doctrine should apply “[t]he most important acts which constitute a sufficient part performance are actual possession, permanent and valuable improvements and these two combined.” *Roundy*, 98 Idaho at 629, 570 P.2d at 866. Here, there is substantial evidence in the record of both improvement and possession. The HOA cannot dispute this, so it simply attempts to explain why the improvement and possession should mean

less. However, a full consideration of the improvements and the Lees' use illustrates exactly why this Court should find partial performance and estop the HOA from going back on an agreement that has been in effect since Kemp Road and the access points were created.<sup>1</sup>

IV. This Court Should Find The Lees Have An Equitable Interest In Kemp Road And The Access Points By Implication From The Actions Of The Parties

In addition to part performance, the Lees claim that Idaho law should recognize that they have an equitable interest in being able to access Kemp Road. Significantly, Idaho has recognized that such an interest can arise “by implication from the language of the deeds or the conduct of the parties.” See *Birdwood Subdivision Homeowner's Ass'n, Inc. v. Bulotti Const., Inc.*, 145 Idaho 17, 23, 175 P.3d 179, 185 (2007) (quoting 20 Am.Jur.2d, Covenants, Etc., § 155 (2005) (an equitable servitude arises “by implication from the language of the deeds or the conduct of the parties.”)); see also *Idaho Power Co. v. State, By & Through Dep't of Water Res.*, 104 Idaho 575, 587, 661 P.2d 741, 753 (1983) (“restrictive covenants and equitable servitudes” relate to “[a]greements not to assert ownership rights.”). And as explained in the Lees' opening brief, here, the language of the deeds and conduct of the parties clearly suggest such an implication. See Appellant Brief, p.17.

In response, the HOA parrots the argument it asserted before the district court--that this equitable doctrine should apply because of an archaic technicality that has not been adopted by Idaho Courts. See Respondent's Brief, p.9 (“equitable servitude does not, like an easement,

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<sup>1</sup> Additionally, the hyper-technical reading suggested by the HOA runs counter to even having a potential equitable theory. The case law shows that courts look at possession and the circumstances surrounding that possession--here evidence in the record indisputably shows the Lees have been accessing their property using the three access points to Kemp Road, that the Lees constructed gates and fencing that facilitate and improved their access, and that this access to and use of Kemp Road was known to at least one member of the HOA. See *Horn Aff.*, ¶7 (R., p.176) (“It was obvious to me and anyone living in the subdivision, that the Lees accessed their property from Kemp Road.”).

afford a right of entry”). The HOA asserts that in Idaho in certain contexts the law distinguishes between easements and real covenants and that Idaho should keep this distinction to limit the equitable relief related to the doctrine of equitable servitude. Admittedly, the HOA cites law from other jurisdictions that make that distinction. See Respondent’s Brief, pp.13-14. However, the HOA also admits that “[t]his Court has not addressed whether equitable servitudes provide for affirmative access rights that can be equitably enforced.” See Respondent’s Brief, pp.13-14. And, just as significant, the HOA fails to appreciate the significance of *West Wood Investments, Inc. v. Accord*, 141 Idaho 75, 83, 106 P.3d 401, 409 (2005) a seminal case on the application of the doctrine of equitable servitude. In *West Wood*, this Court clearly sanctioned the use of equities to assure that members of a subdivision would have access to a common area lot and thus precluded the developer’s successor from interfering with that use. Indeed, the very language cited by the HOA makes clear that *West Wood* involved an affirmative right to access:

This case addresses whether common area allegedly created by a developer/ mortgager may establish an equitable interest in persons who purchase a unit in the project, and whether such interests [the interests of the homeowners to use the common lot] are enforceable against the mortgagee’s successor in interest.

*West Wood*, 141 Idaho at 82, 106 P.3d at 408. Thus, *West Wood* involved both an affirmative right to use the common lot and put a restriction on the subsequent owner (mortgagee’s success) preventing use.

The HOA also asserts that the Lees cannot establish an equitable servitude because “there is no planned unit development involving a common grantor that promised certain amenities to the Lees who own property in that planned unit development.” See Respondent’s Brief, p.36. Again, the HOA attempts to limit applicable case law by citing irrelevant facts. Regardless, the facts here reveal significant similarities. Here, there was common ground, both the Lees and the Kemps were owners of land that became part of the HOA--the Lees sold the Kemps land needed



to for the development and to construct Kemp Road. The record clearly indicates that the Lees and the Kemps both wanted to develop their ground and also wanted both their respective properties to benefit from the construction of Kemp Road. Mr. Lee testified:

To develop the “Kemp property” the Kemps needed approximately 1.8 acres of real property owned by the Lees. My wife and I were willing to sell them the 1.8 acres needed, but required as a condition of that sale, wanted to ensure that we would have access to the road that was to be constructed by the Kemps.

*See* Lee Decl.¶4 (R., p.39). And, more significantly, the common ground, Kemp Road, was clearly designated for a particular use that included a benefit to a necessary participant in the creation of the HOA, here, the Lees. In short, there was both common ground in terms of the HOA development and a common purpose in the construction of Kemp Road.

Moreover, here, the equities are even stronger because the Lees have actually been using Kemp Road and the HOA had knowledge of the easement agreement. *See* Mills Decl., Ex. A (R., p.37) (“As a former HOA board member, I can say with a high degree of certainty that the HOA at the time was aware of the Agreement and its terms regarding the three driveway access.”); *see also* Horn Aff., ¶7 (R., p.176) (“It was obvious to me and anyone living in the subdivision, that the Lees accessed their property from Kemp Road.”)).

In short, this Court should continue to allow equitable relief in the context of a promise regarding real property. Whether or not the right is affirmative or negative should not dispositive. In this case, the Lees and the Kemps agreed to develop their property and that the Kemps would construct a road that would be used by both parties—in essence, a common area. And, the “implications from the language and deeds [and] conduct of the parties” confirm that agreement and clearly establish an equitable basis that affords the Lees the right to continue to use Kemp Road to access their property.

V. This Court Should Deny The HOA's Request For Fees On Appeal And Vacate The District Court's Order For Fees After Reversing Or Remanding This Case Back To The District Court

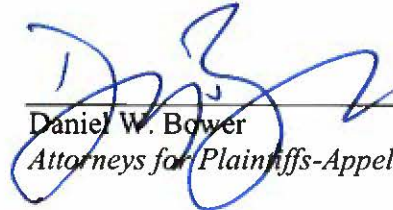
The Lees are not contesting the district court's award of fees pursuant to Idaho Code § 12-120(3). The Lees simply request the order awarding fees and costs be reversed in the event that the matter is reversed and/or remanded back to the district court. There is no basis for an award of fees pursuant to Idaho Appellate Rule 41 in the event that this Court determines that HOA is not the prevailing party.

CONCLUSION

The Lees respectfully request this Court reverse the Memorandum Decision granting summary judgment in favor of the HOA and enter summary judgment in favor of the Lees, or in the alternative, remand the case back to the district court to resolve genuine issues of material fact that should have precluded entry of summary judgment in favor of the Lees.

DATED this 25<sup>th</sup> day of April, 2018.

MORRIS BOWER & HAWS PLLC



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Daniel W. Bower  
*Attorneys for Plaintiffs-Appellants*

CERTIFICATE OF SERVICE

I hereby certify that on this 25<sup>th</sup> day of April, 2018, I caused to be served two (2) true and correct bound copies of the Brief of Appellant by the method indicated below, and addressed to the following:

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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email addresses:

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